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Coulter and Smith, LTD. v. Roger Russell, Roger Richards, Kristin Russell : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

COULTER & SMITH, LTD., a Nevada corporation, Plaintiff and Appellant, **vs.** **ROGER RUSSELL, ROGER RICHARDS, and KRISTIN RUSSELL,** Defendants and Appellees.	**APPELLEES' BRIEF** **Case No. 950726-CA** Priority No. 15

APPEAL FROM SUMMARY JUDGMENT OF THIRD DISTRICT COURT, JUDGE HOMER F. WILKINSON

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(k).

STATEMENT OF ISSUES

Whether a letter agreement which purports to create an option to purchase subdivision lots to be developed on unimproved real property is enforceable where

(1) the written language of the agreement lacks the total number and size of the lots or a formula for determining such;

(2) the written language of the agreement lacks an outside date for exercise of the option--which exercise is conditioned upon completion of subdivision development by the optionee;

(3) a reasonable time has passed without completion of subdivision development; and

(4) any unilateral offer or bilateral contract to sell lots created by the agreement was withdrawn or rescinded.

STANDARD OF REVIEW

This matter is on appeal from the district court's grant of summary judgment in favor of Roger Russell ("**Russell**"), Roger Richards, and Kristen Russell. On appeal, this Court applies the same standard for summary judgment as applied by the district court and may review the entire record to determine the correctness of the district court's conclusions of law including conclusions that there is no genuine issue as to any material fact. Neiderhauser Builders & Dev. Corp. v. Campbell, 824 P.2d 1193, 1196 (Utah App. 1992). In addition, the court may affirm the district court's grant of summary judgment on any

ground available to the district court, even if it was not relied on below. Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993).

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 25-5-3.

Leases and contracts for interest in lands.

> Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

STATEMENT OF THE CASE

Coulter & Smith, Ltd. ("**Coulter**") commenced this action for specific enforcement and for damages based upon a letter agreement (the "**Letter Agreement**") which allegedly created an option for the sale of subdivision lots which were to be developed on unimproved real property owned by Russell. R. 1-52, Complaint. Russell moved for dismissal or, in the alternative, summary judgment based on the undisputed facts which showed that any option rights created by the Letter Agreement were void and unenforceable as a matter of law. R. 121-22, Motion for Summary Judgment. Russell's motion was granted by the district court after hearing. R. 469-77, Transcript. The district court issued findings of fact and conclusions of law and entered judgment dismissing Coulter's claims with prejudice. R. 453-57, Findings of Fact and Conclusions of Law; R. 461-63, Amended Summary Judgment. Coulter subsequently commenced this appeal. R. 464-65, Notice of Appeal. Russell moved for summary disposition, which motion was deferred until further consideration. This matter was subsequently poured over to this Court for disposition.

STATEMENT OF UNDISPUTED FACTS

1. In 1991, Russell and Coulter each owned or controlled undeveloped land located in an unincorporated portion of Salt Lake County (the "**Russell Property**" and the "**Coulter Property**"). R. 69-70, Affidavit of Roger Russell ¶ 3; R. 218, Affidavit of Nathan Coulter ¶ 6. The Russell Property consists of approximately 3.67 acres and is located several hundred yards north of the Coulter Property. See R. 264, Map. The land between the Russell Property and the Coulter Property consists of essentially four parcels owned by four unrelated parties (the "**Intervening Properties**"). Id.; R. 219, Affidavit of Nathan Coulter ¶¶ 12, 13. The properties are situated such that it is possible to develop all of them together as one subdivision. See R. 264, Map.

2. Russell intended to personally develop and subdivide the Russell Property and had hired engineers to design a layout for subdivision development. R. 218, Affidavit of Nathan Coulter ¶ 7. Coulter was in the business of real estate development and also had plans to develop its property. R. 342, Supplemental Affidavit of Nathan Coulter ¶ 5. Upon learning of their similar development interests, the parties engaged in discussions and negotiations concerning joint development of their properties and/or sale of the Russell Property to Coulter. Id.

3. As a result of their negotiations, Coulter prepared the Letter Agreement to be signed by Russell which memorialized Russell's offer to sell subdivision lots to be developed in the future by Coulter on the Russell Property. R. 70, Affidavit of Roger Russell ¶¶ 4, 5. Russell signed the Letter Agreement on April 27, 1991. Id. Russell understood that along with development of the Russell Property, Coulter intended to acquire

the Intervening Properties and develop all properties together as a large, single subdivision. R. 218-19, Affidavit of Nathan Coulter ¶¶ 7-8, 12. Coulter paid no money for Russell's offer to sell. R. 69-70, Affidavit of Roger Russell ¶ 3.

4. The description of the property offered for sale in the Letter Agreement provides: "your lots west of 1700 East at 10800 South." R. 10, Letter Agreement. When the Letter Agreement was signed, there were no developed "lots." At present, no subdivision plat has been prepared, and no legislative approval has been obtained for commencement of subdivision development. See R. 228, Memorandum in Opposition to Summary Judgment. The Russell Property remains an undeveloped 3.67-acre parcel. See R. 61, Affidavit of George Shaw ¶¶ 6-8; see R. 2, Complaint ¶ 4; R. 71, Affidavit of Roger Russell ¶ 12;

5. When the Letter Agreement was signed, the parties were uncertain as to how many lots would or could eventually be developed on the Russell Property. The parties believed and expected that Sandy City would zone the property for 15,000 or 10,000 square-foot lots which would allow for development of eight or ten lots. R. 217-18, Affidavit of Nathan Coulter ¶ 5; R. 344, Supplemental Affidavit of Nathan Coulter ¶ 10.

6. Under the Letter Agreement, the price to be paid by Coulter for the completed lots was $26,500 per lot with the price to increase $100 per lot per month for each month a lot remained unpurchased after development of the subdivision. The relevant language from the Letter Agreement provides:

> Price: $26,500 per lot during the 1st month following completion of the lots; price of each lot to increase $100 per lot each month thereafter until each lot is closed.

> Upon completion of the subdivision development we offer to pay you $1,500 per lot; the balance of the purchase price ($25,000 at the outset) to be paid upon closing of each lot.

R. 10, Letter Agreement.

7. No outside date was provided in the Letter Agreement for Coulter to complete subdivision development and, thus, trigger its right to purchase the completed lots. R. 10, Letter Agreement. However, the parties understood that Coulter would forthwith begin development and that the lots would be completed and purchased beginning in Spring 1992. R. 219, Affidavit of Nathan Coulter ¶ 12; R. 346, Supplemental Affidavit of Nathan Coulter ¶ 14.

8. Coulter never submitted any formal application with Sandy City to annex the Russell Property which was a necessary prerequisite to subdivision development. R. 61, Affidavit of George Shaw ¶ 7.

9. Coulter failed to perform any physical work on the Russell Property in furtherance of subdivision development. R. 71, Affidavit of Roger Russell ¶ 12; see R. 228, Memorandum in Opposition to Summary Judgment.

10. Coulter failed to acquire any of the four Intervening Properties by Spring 1992 as was necessary to begin meaningful work on its large, single subdivision plan. R. 219, Affidavit of Nathan Coulter ¶ 13.

11. Even though the parties intended for Coulter to have completed subdivision development and tendered payment for the lots by Spring 1992, Russell cooperated with Coulter and acquiesced to approximately six months of additional time for performance

based on weekly or biweekly updates provided by Coulter after such original time had lapsed. R. 219, Affidavit of Nathan Coulter ¶¶ 12-13.

12. In November 1992, approximately six months after Coulter was to have completed development of the Russell Property, the LDS Church offered to purchase the Russell Property. Russell informed Coulter of his intention to accept because Coulter had neither completed subdivision development nor purchased the lots by Spring 1992 as promised. R. 3, Complaint ¶ 12; R. 70, Affidavit of Roger Russell ¶ 9; R. 219-20, Affidavit of Nathan Coulter ¶ 14.

13. Problems and disputes arising out of Russell's intended sale to the LDS Church led to negotiations between the parties and the LDS Church whereby all agreed that Russell and Coulter would exchange properties and the LDS Church would then buy a portion of the Coulter Property from Russell as the owner. R. 3, Complaint ¶ 13; R. 70, Affidavit of Roger Russell ¶ 10; R. 220, Affidavit of Nathan Coulter ¶ 15. Russell was to receive a total of $230,000 through the exchange agreement. R. 21, Real Property Exchange Agreement. The exchange agreement fell through. However, because the LDS Church was still interested in buying property in the area, Coulter later sold a portion of the Coulter Property to the LDS Church. R. 220, Affidavit of Nathan Coulter ¶ 16.

14. Another year-and-a-half passed and, in May 1994, a competing developer offered to buy the Russell Property. R. 71, Affidavit of Roger Russell ¶ 11. In furtherance of the offer, the developer took the first step toward development and submitted an annexation petition to Sandy City. R. 220, Affidavit of Nathan Coulter ¶ 18; R. 61, Affidavit of George Shaw ¶¶ 7-8. On September 13, 1994, Sandy City annexed the Russell Property

and zoned it for minimum 20,000 square-foot residential lots. R. 61, 67-68, Affidavit of George Shaw ¶ 8 and Exhibit "D" thereto.

15. On September 14, 1994, three-and-a-half years after the Letter Agreement was signed and one day after the Russell Property was annexed and zoned by Sandy City, Coulter commenced this action for specific performance of the Letter Agreement. R. 1-52, Complaint.

16. As part of its lawsuit, Coulter alleges that it provided substantial, valuable, and beneficial improvements as follows: (1) redesigning plans for a single subdivision which include the Coulter Property, the Intervening Properties, and the Russell Property; (2) rallying neighborhood support for rerouted access points for the planned single subdivision through the Russell Property; (3) conducting extensive negotiations with Sandy City to adopt the rerouted access plan; and (4) spending $35,000[1] to redesign and enlarge a master drain system located on the Coulter Property to accommodate future hookup to lots on the Russell Property. Appellant's Brief, at 17-18.

17. Since Coulter has not developed or subdivided any of the properties which were to be a part of his single subdivision plan, none of the properties (including the Russell Property) have realized any tangible benefits from Coulter's preliminary efforts. See R. 228, Memorandum in Opposition to Summary Judgment.

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[1] In other places in its appellate brief, Coulter alleges $50,000 was spent for this improvement. See, e.g., Appellant's Brief, at 27. The affidavits of Nathan Coulter filed in this case also contain conflicting figures of $50,000 and $35,000 in total amounts spent. R. 219, Affidavit of Nathan Coulter ¶ 11 ($50,000); R. 345, Supplemental Affidavit of Nathan Coulter ¶ 12 ($35,000). Based on the fact that Coulter selected the $35,000 figure in its statement of facts, Appellant's Brief, at 6, Russell will also rely on this figure.

18. Coulter's $35,000 improvement to the master drain system is located on the Coulter Property, and the Russell Property does not presently have dedicated line access to that improvement. R. 262, Second Affidavit of Roger Russell ¶ 6; R. 345-46, Supplemental Affidavit of Nathan Coulter ¶ 13. Pursuant to written contract, Russell has paid Coulter $12,820 for his share of costs in redesigning and enlarging the master drain system which may eventually service all lots to be developed on all properties. R. 262, Second Affidavit of Roger Russell ¶¶ 4-5; R. 52, Three-Way Work Exchange Agreement; R. 345-46, Supplemental Affidavit of Nathan Coulter ¶¶ 12-13.

19. When Coulter commenced its action against Russell in September of 1994, it was also suing for specific performance of a contract to purchase one of the four Intervening Properties. R. 304-13, Certified Copy of Complaint and Answer in Coulter & Smith, Ltd. v. Kemp.

20. Coulter has never had any written or oral agreement to purchase one of the four Intervening Properties. R. 320, Affidavit of Karen Hillstead Smith ¶¶ 1-4.

21. When Coulter commenced this lawsuit, it lacked authority to transact business in Utah. R. 318, Certificate of Revocation.

SUMMARY OF THE ARGUMENT

1. Lack of Essential Terms in Writing.

Utah law requires that contracts for sale of real property must clearly set forth all essential terms and must be in writing. Essential written terms include the description of the property and the price. In this case, the property subject to Coulter's purchase rights was described as "lots" to be developed on the Russell Property to be sold at a set price after

completion of the subdivision development. There were no lots in existence at the time the Letter Agreement was signed. The Letter Agreement did not specify the total number or the size of the lots to be developed and sold or written language concerning the parties' agreement, if any, as to how the total number and size of the lots was to be determined. The Statute of Frauds voids the Letter Agreement for this reason and prevents parole evidence from being used to prove what the parties' agreement may have been.

Coulter has not sufficiently performed the Letter Agreement to satisfy the Statute of Frauds to allow parol evidence to show the parties' agreement as to the total number and size of the lots. Coulter's alleged improvements to the Russell Property in reliance on the Letter Agreement are not exclusively referable to the alleged oral agreement and are not substantial, valuable, or beneficial as required by law to satisfy the Statute of Frauds. Moreover, the acts alleged do not meet the evidentiary purpose of part performance and estoppel to prove what the parties' agreement may have been.

Even ignoring application of the Statute of Frauds, Coulter's proffered parol evidence concerning the parties' agreement is inconclusive and merely shows that the parties had failed to agree on how to determine the total number and size of the lots. Accordingly, the essential terms are not clear, and specific performance is appropriately denied.

2. Lack of Outside Date for Vesting.

The Letter Agreement provides no outside date for Coulter to complete development and exercise its rights to purchase "lots." The rule against perpetuities voids such remotely vesting interests even if all conditions for vesting are met within the perpetuities period. Utah courts apply this rule, even in commercial settings, to determine the validity of options

to purchase land. In this case, the language of the Letter Agreement does not meet the vesting requirements of the rule against perpetuities and, thus, is void ab initio.

3. Lapse of Purchase Rights.

If the Court rejects application of the rule against perpetuities, it must do what Coulter failed to do when it drafted the Letter Agreement and supply an outside date for exercise of its purported option rights. Under general contract principles, the Court must view the totality of the circumstances to imply a reasonable time for performance and exercise. In this case, such reasonable time is Spring 1992. The undisputed facts show that this was the agreed and/or intended time that Coulter was to have completed development and paid Russell. Equity will not tolerate that Russell continue to endure prejudicial delay where he should have been paid for his property in Spring 1992. Additionally, the facts indicate that Coulter will not be able to tender performance according to the original tenor of the parties' agreement until months or years in the future or perhaps never. The Court should, accordingly, determine that Coulter's rights under the Letter Agreement, if any, have lapsed.

4. Withdrawal of Offer/Recission of Contract.

Coulter paid no consideration for the Letter Agreement, and Russell is entitled to withdrawal any unilateral offer created therein at any time before acceptance. Coulter has never accepted Russell's offer by performing according to the terms of the Letter Agreement which required development of lots and payment. Russell is, thus, entitled to withdraw his offer. Russell did so unequivocally in November 1992 when he informed Coulter of his intent to sell the Russell Property to the LDS Church.

Coulter's alleged acts in reliance on the Letter Agreement are insufficient for application of the doctrine of promissory estoppel to prevent Russell from withdrawing his offer or supplying substitute consideration to support an enforceable contract. Such acts were not substantial, valuable, or beneficial to Russell and were merely preparatory to what was required for tender under the Letter Agreement. Moreover, to the extent any of Coulter's acts may be construed sufficient to create an enforceable obligation, Russell is justified to rescind based on Coulter's prejudicially-late, prospective performance.

ARGUMENT

I. THE LETTER AGREEMENT IS VOID UNDER THE STATUTE OF FRAUDS AND LACKS ESSENTIAL TERMS TO SUPPORT AN ENFORCEABLE CONTRACT

Under Utah law a contract involving the sale of land is not enforceable unless all the essential elements and terms of such contract are clear and contained in a written document. Utah Code Ann. § 25-5-3 (Statute of Frauds); Birdzell v. Utah Oil Refining Co., 121 Utah 412, 242 P.2d 578 (1952) ("It is fundamental that the memorandum which is relied on to satisfy the Statute of Frauds must contain all the essential terms and provisions of the contract."); see also Barnard v. Barnard, 700 P.2d 1113, 1114 (Utah 1985) ("Specific enforcement may be granted only if the parties' intent as to the essential terms of the agreement is clear.")

Essential elements of a land sales contract include a description that provides reasonable certainty as to the size and location of the property and the price of such property. See generally, 6A Richard R. Powell & Patrick J. Rohan, Powell on Real Property ¶ 880[1][b], at 81-35 to 81-46 (1995) (discussing that the Statute of Frauds requires essential

terms of parties' contract to be set forth clearly in writing, including a description of the property, the terms and conditions of the contract, and the price) [hereinafter cited as Powell].

In this case, the Letter Agreement is void under the Statute of Frauds because its written provisions do not include essential terms of the parties' agreement to define the total number and size of the lots to be developed on the Russell Property subject to Coulter's purported option rights. In addition, even if the parol evidence proffered by Coulter of the parties' alleged agreement concerning the total number and size of the lots is considered under partial performance or estoppel doctrines, such parol evidence lacks the certainty required for specific performance of land sales contracts. This Court should, accordingly, affirm the district court's ruling that the Letter Agreement is void and unenforceable.

A. The Letter Agreement does not Include Written Language as to the Total Number and Size of the Lots to be Developed on the Russell Property or a Formula to Determine Such.

Referring to subdivision lots to be developed on the Russell Property by Coulter, the written language of the Letter Agreement provides for sale of "your lots west of 1700 East at 10800 South." R. 10, Letter Agreement. There were no lots when the Letter Agreement was signed, and the existence of such lots was necessarily contingent upon annexation of the Russell Property to Sandy City; adoption of a zoning ordinance covering the property; and the preparation, approval, and filing of a final subdivision plat. Since, at the time the Letter Agreement was signed, the total number and size of the lots was dependent upon these administrative contingencies and non-existent documents, the description of "lots" in the Letter Agreement is fatal to enforceability because it describes nothing. Berg v. Ting, 125

Wash. 2d 544, 886 P.2d 564, 568-69 (1995) (Grant of easement providing that location of easement would be determined with regard to finally approved and recorded subdivision plat held fatally defective and void under the Statute of Frauds because granting language referred to "nonexistent instrument as defining the servient estate.") (emphasis in original); see also Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491, 493-94 (1967) (Written contract held not specifically enforceable where written language provided for sale of 30 acres of 189 acres owned by seller "as indicated by map" but no map was ever shown to the buyer.).[2]

Recognizing that the total number and size of the lots described in the Letter Agreement cannot be defined by reference to nonexistent plat maps or other written documents, Coulter argues that this Court should accept parol evidence establishing an alleged agreement between the parties as to how the total number and size of the then non-existent lots were to be determined. Coulter supports its position with reference to the

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[2] The Nebraska case discussed by Coulter, Bellevue College v. Greater Omaha Realty Co., 217 Neb. 183, 348 N.W.2d 837 (1987), to support its argument that a "lot" may be sold even before it exists is distinguishable from the cases cited above and the case at hand. In Bellevue, the amount of land to be conveyed was fixed at "approximately two acres" so there was no question as to how much property was to be conveyed. In addition, even though the final plat had not been recorded when the parties entered into their contract, the court was able to examine preliminary plats to determine exactly where the property was to be located on the finally approved plat.

> Furthermore, it appears from an examination of certain of the preliminary plats that the property ordered by the trial court to be conveyed by Greater Omaha to Bellevue College is exactly the land which was designated by Greater Omaha as a specific lot in exhibits 15 and 16, first as Lot 40 and then as Lot 41.

Id. at 841. In contrast, in this case, the size of the lots was, and remains, uncertain, and there was no preliminary plat map to ascertain the undefined lots described in the Letter Agreement.

generally accepted rule that where a property description is ambiguous, courts will entertain extrinsic and parol evidence to more particularly define the property. See Powell ¶ 880[1][d][iii], at 81-40 to 81-42 (commenting that courts will generally allow extrinsic and parol evidence to clarify ambiguities in property descriptions such as "Smith's Ranch," the "Shell Building," the "office building on the corner of Main and Broadway," etc.).[3]

While parol evidence is generally admissible under the above-authority to clarify what property was meant to be described in an ambiguous property description, this authority does not establish that parol evidence may prove essential and material terms left out of the parties' written agreement as to how they decided to describe the property. This subtle, but important, distinction is illustrated in several Utah cases. For example, in Calder v. Third Judicial District, 2 Utah 2d 309, 273 P.2d 168 (1954), the issue was whether a written contract satisfied the Statute of Frauds where the language provided that purchaser could

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[3] Only two of the five Utah cases cited by Coulter for this proposition actually support it. E.g., Park West Village, Inc. v. Avise, 714 P.2d 1137 (Utah 1986) (address of property along with physical boundaries at property address clarified ambiguity created by merely describing property by address); Jacobson v. Cox, 115 Utah 102, 202 P.2d 714 (1949) (description limited to "up in the old field, now under fence above Spring Branch Ditch" reasonably described property where evident from extrinsic evidence that the description was such that all parties in rural community knew what property was involved in transaction). The other three cases cited involve situations where partial performance provided an evidentiary foundation for an adequate and reasonably certain description of the property. See Reed v. Alvey, 610 P.2d 1374 (Utah 1980) (parties performance of agreement reasonably identified lot to be conveyed at "corner of Hillview and Ninth East"); Hackford v. Snow, 657 P.2d 1271 (Utah 1982) (three years of possessing certain 20 acres defined by physical boundaries reasonably identified 20 acres to be excluded from contract describing property as "Neola (420 acre Hackford Farm), Uinta County, State of Utah"); Stauffer v. Call, 589 P.2d 1219 (Utah 1979) (physical possession and the making of substantial improvement to two houses and connected acreage reasonably defined property subject to ambiguous written agreement).

purchase 200 acres selected from a larger tract owned by the seller. The contract was challenged under the Statute of Frauds because the location of the 200 acres was not described in the contract. Id. at 169. The court determined that even though the contract did not describe the exact location of the 200 acres, the contract satisfied the Statute of Frauds because the parties' agreement as to how that 200-acre parcel would be located was included in the written language of the contract--namely, that the purchaser could select it. Id. at 170. In contrast, where the property description can be determined only by reference to a collateral or future agreement which is not in the written language of the parties' contract, Utah courts hold such contracts to be unenforceable. Davison v. Robbins, 30 Utah 2d 338, 517 P.2d 1026, 1028 (1973) (Written contract held void under Statute of Frauds where property was described in writing as "approx. 150 acres selling at $90.00 per acre" but the final legal description was contingent on further agreement of the parties.); Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491, 493-94 (1967) (Written contract held not specifically enforceable where written language provided for sale of 30 acres of 189 acres owned by seller "as indicated by map" but no map was ever shown to the buyer.); Vasels v. LoGuidice, 740 P.2d 1375 (Utah App. 1987) (Written contract held unenforceable under the Statute of Frauds where written language provided for sale of one parcel for $1,000,000 which was to be one of four parcels to be carved from 27 acres of land and written contract did not provide how the size and shape of that parcel was to be determined but rather provided that the final description was to be approved by all the parties in writing.).

The Statute of Frauds ensures that all essential and material terms of a contract will be proved by reference to a writing and not by parol evidence thus eliminating the possibility

of perjury, fraud, and uncertainty in land sales agreements. Powell ¶ 880[1][d][iii], at 81-39. The parol evidence Coulter seeks to introduce is not to clarify what lots were subject to its purported option rights--because no such lots existed then or now. Rather, the introduction of such parol evidence is admittedly sought to prove the essential and "material details required for the transfer of the property." Appellant's Brief at 14. This parol evidence--to prove what the parties' agreement was--is barred by the Statute of Frauds and the Letter Agreement is void for lack of an adequate description of the total number and size of the lots subject to Coulter's purported option rights.

B. The Statute of Frauds is not Satisfied by Recharacterization of the Letter Agreement as an Option to Purchase the Russell Property as a Single Parcel

In an apparent recognition of the problems created by seeking specific enforcement of right to purchase undefined lots that have never existed, Coulter argues that the Letter Agreement should be construed as an option for purchase of the entire Russell Property as a single parcel. Through such recharacterization, Coulter explains that the Statute of Frauds is met because there is no dispute as to the size and location of the Russell Property. Appellant's Brief, at 16. Coulter further explains that the reference to "lots" was merely a means by which the parties agreed on a total purchase price for the entire Russell Property. Id. Even if the Court were willing to accept this recharacterization, such spin does not avoid application of the Statute of Frauds--it merely shifts the reason for voidness from lack of essential terms concerning the description of the property to lack of essential terms concerning the price of the property. Birdzell, 242 P.2d at 580 (amount of rent is essential

term); Powell ¶ 880[1][d][v], at 81-44 to 81-46 (discussing price as essential written term for land sales contract).

The price for the lots in the Letter Agreement was fixed as $26,500.[4] Assuming, arguendo, that the Letter Agreement was for the sale of the Russell Property as one parcel, the size and total number of the lots directly affect the price. If twelve lots were developed, the price would equal $318,000; if ten, $265,000; if eight, $212,000; and if six, $159,000. Because there were no lots when the Letter Agreement was signed, the total number of lots and, consequently, the total price for the Russell Property is impossible to determine from the written language of the Letter Agreement. Coulter must, therefore, rely on parol evidence to show what the parties' agreement may have been regarding the total number of lots to be developed. As previously discussed, because the terms of such alleged agreement are a material and essential part of the parties' agreement, parol evidence establishing such terms is barred by the Statute of Frauds, and the Letter Agreement is void. See, e.g., Moore & Assoc. Realty v. Arrowhead at Vail, 892 P.2d 367, 371 (Colo. App. 1994) (Letter of intent to sell specified lot held void under the Statute of Frauds where price for lot was based on a set price for condominium units to be developed on the lot and the written language of the letter of intent did not specify how may condominium units would be built or a formula for determining such number.).

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[4] The Letter Agreement further provided for an increase of $100.00 per lot per month "following completion of the lots." R. 10, Letter Agreement.

C. Coulter's Parol Evidence of the Parties' Alleged Agreement Should Not Be Considered Under the Doctrines of Partial Performance or Equitable Estoppel

Notwithstanding the writing requirement imposed by the Statute of Frauds, Coulter argues that because it has partially performed the Letter Agreement, it should be permitted to introduce parol evidence establishing the material and essential terms concerning the total number and size of the lots which it left out of the Letter Agreement. However, as a matter of law, the acts alleged by Coulter are insufficient to show part performance or support an estoppel theory sufficient to overcome application of the Statute of Frauds. See Bear Island Water Ass'n, Inc. v. Brown, 125 Idaho 717, 874 P.2d 528, 533 (1994) (whether acts are sufficient as part performance is a matter of law).

The doctrines of partial performance and equitable estoppel in connection with oral contracts involving the sale of land were fashioned by courts of equity not to "annul the Statute of Frauds, but only to prevent its being made the means of perpetrating a fraud." Coleman v. Dillman, 624 P.2d 713, 715 (Utah 1981) (footnote omitted); Jacobson v. Cox, 202 P.2d 714, 721 & 723 (1949). Such doctrines are to be "applied with great care" by the courts, and typically require the purchaser to show (1) actual open and exclusive possession of the land with the seller's consent; (2) substantial, valuable, and beneficial improvements to the land; (3) valuable consideration given in exchange for the conveyance; and (4) that all the foregoing were exclusively referable to the oral contract. Coleman, 624 P.2d at 715; see also Powell ¶ 880[2][c][i], at 81-69 to 81-70 (discussing that part performance generally requires paying the contract price, taking possession of the property, and making

improvements thereon; further commenting that most courts will require at least two of the three conditions to be satisfied).

Since Coulter does not have possession of the lots and paid no consideration[5] for its purported option to purchase such lots, its partial performance and estoppel theories must rest solely on whether it made substantial, valuable, and beneficial improvements to the Russell Property which were exclusively referable to the Letter Agreement. Coulter specifically alleges four categories of substantial, valuable, and beneficial improvements as follows: (1) redesigning plans for a single subdivision which would include the Coulter Property, the Intervening Properties, and the Russell Property; (2) rallying neighborhood support for rerouted access points for the planned single subdivision through the Russell Property; (3) conducting extensive negotiations with Sandy City to adopt the rerouted access plan; and (4) spending $35,000 to redesign and enlarge a master drain system located on the Coulter Property to accommodate future hookup to the Russell Property when the single subdivision was complete. Appellant's Brief, at 17-18.

Case law establishes that Coulter's first three categories of alleged substantial, valuable, and beneficial improvements are insufficient to support a claim of partial performance or estoppel. Redesigning plans, rallying neighborhood support, and even negotiations with city officials are merely preparatory and ancillary to the condition

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[5] Coulter claims that its alleged partial performance constitutes "ample consideration." Appellant's Brief, at 26-29. It is clear, however, that no consideration was given in exchange for the Letter Agreement and Coulter's "consideration" arguments are more in the nature of promissory estoppel. See infra. In any event, for purposes of part performance and estoppel theories, the acts alleged in reliance of the agreement cannot serve as both the "consideration" and the "part performance."

precedent of Coulter's right to purchase lots. Coulter was to "complete the subdivision development." R. 10, Letter Agreement (emphasis added). Preparatory and ancillary acts to fulfill this condition to purchase do not provide an adequate equitable basis for avoiding the Statute of Frauds. For example, in Baugh v. Logan City, 27 Utah 2d 291, 495 P.2d 814 (1972), the Utah Supreme Court rejected the purchasers' argument that it had partly performed an oral contract because they had "at great expense to themselves" surveyed the land promised to be conveyed. Id. at 815. The court rejected the purchasers' arguments and explained as follows:

> Acts merely ancillary to an oral agreement for the sale of lands, although attended with expense, are not considered acts of part performance sufficient to relieve the case from the provisions of the statute of frauds.

Id. at 817 (quoting DeMarco v. Estlow, 18 N.J. Super. 30, 86 A.2d 446, 447-48 (1952)); see also Williams v. Fulton, 30 Wash. App. 173, 632 P.2d 920 (1981) (Part performance not shown where purchaser paid $1,000 earnest money, conducted various tests and surveys on the property, and arranged for the property's zoning designation to be changed.). Additionally, it is clear from the record that none of Coulter's efforts relating to redesigning of plans, rallying neighborhood support, and meeting with city officials have done anything to provide a tangible benefit the Russell Property. Coulter has been unable to consummate its single subdivision plan for nearly five years, and the record strongly suggests that it may never accomplish what it originally set forth to do.[6] Unless and until Coulter is able to

[6] It is apparent that Coulter has several major obstacles to overcome before it can or will develop the Property as planned and promised. These include (1) rezoning of all properties included in its single subdivision plan to allow for building of 10,000 or 15,000

bring all of his preliminary plans, neighborhood support, and governmental approvals together to actually develop the Russell Property as part of a single subdivision, all such preliminary acts are of no value or benefit to the Russell Property. As a matter of law, this Court should, therefore, determine that such acts do not constitute part performance or support an estoppel theory.

Coulter's fourth category of alleged substantial, valuable, and beneficial improvements regarding the $35,000 spent to redesign and enlarge the master drain system, although representing a substantial expenditure by Coulter, is also insufficient to prove part performance or support an estoppel theory. This improvement fails as part performance because it is not on the Russell Property but on the Coulter Property. Accordingly, it should also be considered ancillary and will not actually benefit the Russell property unless Coulter is able to successfully consummate its single subdivision plan and install connecting lines. R. 261, Second Affidavit of Roger Russell, ¶¶ 4, 6 (establishing that improvements are located on the Coulter Property and that no connecting lines run between it and the Russell Property). More importantly, however, the alleged improvement fails as partial performance

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square-foot lots as originally contemplated, R. 67-68, Ordinance for Annexation and Zoning Ordinance of the Russell Property, (2) resolving a lawsuit with one Intervening Property owner, R. 304-13, Complaint and Answer in Coulter & Smith, Ltd. v. Kemp, and (3) purchasing a parcel from another Intervening Property owner who has, as yet, declined to sell. R. 319-322, Affidavit of Karen Hillstead Smith. Even if all preliminary matters were resolved, actual development would take substantial efforts and significant time to accomplish. See Sandy City Code of Ordinances, Subdivision Regulations § 15-34-1 et seq. (Draft Feb. 6, 1996) (administrative, bonding, and construction requirements for subdivision development). At present, it is also questionable whether Coulter can even legally purchase or develop any property as its authority to transact business in Utah has been revoked. See R. 318, Certificate of Revocation.

because it is not "exclusively referable" to the oral agreement sought to be enforced. Russell knew of Coulter's single subdivision plan and agreed to cooperate in its development efforts. R. 218-19, Affidavit of Nathan Coulter ¶¶ 7-8, 12. In acknowledgment of the fact that the redesign and enlargement of the main drain system to be installed on the Coulter Property might eventually benefit the Russell Property (even if Coulter never completed its single subdivision as planned), Russell agreed (in a separate written agreement) to pay, and later paid, Coulter $12,820 for his share of the cost to enlarge the master drain. R. 261, Second Affidavit of Roger Russell ¶¶ 4-5. Coulter even attached the parties' written agreement entitled "THREE-WAY WORK EXCHANGE AGREEMENT" to its Complaint which expressly sets forth Coulter's contractual obligation to "enlarge a master drain system to be installed as per the design of Bush & Gudgell; this enlargement requested by and for the benefit of certain property under the control of Dr. Roger Russell." R. 52, Three-Way Work Exchange Agreement. Accordingly, since Coulter's expenses incurred in redesigning and enlarging the master drain system were not "exclusively referable" to the Letter Agreement, such expenditures cannot support partial performance or equitable estoppel. See Coleman v. Dillman, 624 P.2d 713, 715-16 (Utah 1981) (rejecting enforcement of oral agreement where improvements and possession were not "exclusively referable" to oral sales contract but equally referable to lease).

A further problem with Coulter's part performance and estoppel arguments is that the alleged acts do not assist the Court in determining the essential terms of the contract which Coulter left out--namely, the total number and size of the lots to be developed on the Russell Property. As previously set forth, partial performance does not "annul the Statute

of Frauds, but only [prevents] its being made the means of perpetrating fraud." Coleman, 624 P.2d at 715. Part performance only satisfies the goals of the Statute of Frauds to prevent fraud and provide certainty if the part performance clearly evidences the terms of the parties' agreement that should have been in writing but were not. Accordingly, courts require that part performance show evidence of the material terms left out of the parties agreement. For example, where the property is ambiguously described, courts will look at the acts of part performance to fulfill an evidentiary function to define what the parties left out of their agreement. See, e.g., Reed v. Alvey, 610 P.2d 1374 (Utah 1980) (suit for specific performance upheld where extrinsic evidence of parties' actions specifically identified property subject to ambiguous property description); Hackford v. Snow, 657 P.2d 1271 (Utah 1982) (same); Stauffer v. Call, 589 P.2d 1219 (Utah 1979) (oral agreement enforced notwithstanding Statute of Frauds where acts of parties and natural boundaries adequately defined property subject to agreement). The court in Berg v. Ting, 125 Wash. 2d 544, 886 P.2d 564 (1995), emphasized this principle in a case with similar problems as those encountered in this case. The parties had agreed in writing to grant an easement with reference to a subdivision plat that was not in existence at the time the agreement was signed. Id. at 568. The court held that the agreement could not be enforced under the Statute of Frauds because the written agreement referred to a nonexistent instrument to define the servient estate and did not reference an instrument which contained such a description. Id. at 569. The grantees of the easement argued for enforcement of the easement because their withdrawal of opposition to the subdivision platting served as partial performance of the agreement. Id. at 567, 572. Even though the parties had a written

agreement and had arguably partly-performed through withdrawal of their opposition, the court rejected the grantee's argument because the partial performance alleged "reveal[ed] nothing about the character or terms of any contract." Id. at 572. Similarly, in this case, none of the acts alleged by Coulter satisfy the evidentiary function of the equitable doctrines of part performance and estoppel necessary to overcome the Statute of Frauds because they fail to define what the parties' agreement concerning the total number and size of the lots to be developed on the Russell Property. For the reason that Coulter's acts are legally insufficient to support partial performance and estoppel theories and for this additional reason, Coulter's partial performance and estoppel arguments should be rejected by the Court.

D. The Parol Evidence Proffered by Coulter Fails to Clearly Describe the Parties' Agreement

Assuming, arguendo, that the Court is willing to consider Coulter's parol evidence, it must determine whether such evidence provides clear and convincing evidence of the material and essential terms left out of the Letter Agreement.

> The evidence must show a meeting of the minds based on an offer and a sufficient acceptance, as well as the consideration necessary for a valid contract. There must also be no proof of mistake, misrepresentation or illegality that would otherwise invalidate the contract. Generally, the standard for proving the existence of an oral contract and its terms is demanding. Proof requires clear and convincing evidence.

Powell ¶ 880[2][a], at 81-57 to 81-58 (emphasis added); see also Barnard v. Barnard, 700 P.2d 1113, 1114 (1985) ("Specific enforcement may be granted only if the parties' intent as to the essential terms of the agreement is clear."); In re Roth's Estate, 2 Utah 2d 40, 269

P.2d 278, 280 (1954) (specifically enforceable land contract must be "definite, certain and fair").

In this case, the material and essential terms which Coulter wishes to prove by parol evidence is the parties' agreement as to the total number and size of the lots that were to be developed on the Russell Property. Because Sandy City has unfavorably zoned the Russell Property for 20,000 square-foot lots, only six lots may be developed. R. 61, 67-68, Affidavit of George Shaw ¶ 8 and Exhibits "D" thereto. Accordingly, Coulter argues that its parol evidence clearly and convincingly shows that the parties agreed that the total number and size of the "lots" would be determined by whatever zoning was ultimately approved by Sandy City with Russell to exclusively bear the benefit or burden of favorable or unfavorable zoning. Appellant's Brief, at 4, 14, 16.

However, contrary to Coulter's arguments, the affidavit testimony relied on establishes, at the very most, that the parties agreed that the total number of lots would be eight or ten based on their mutual understanding and expectation that Sandy City would zone the Russell Property for 15,000 or 10,000 square-foot lots.

> The zoning for the 3.67-Acre Parcel had not been finalized at the time of the Option Agreement. Russell and I believed that we could procure R-1-15 or R-1-10 zoning, which would allow 8 to 10 lots to be developed. The purchase price for the 3.67-Acre Parcel was thus contingent on the zoning that could be obtained.

R. 217-18, Affidavit of Nathan Coulter ¶ 5.

> Dr. Russell assured me in conversations both prior to April 27, 1991 and thereafter that he was confident that his contacts with the local neighbors would be sufficient to obtain their agreement to the proposed R-1-15 or R-1-10 zoning. Dr.

> Russell told me that he had friends in the nearby Cobblestone subdivision with whom he had already spoken, and that no one in that subdivision was opposed to the R-1-15 or R-1-10 zoning. Dr. Russell also said that he could deliver approval from the Bell Canyon Homeowners Association since he sat on the board of directors of that entity. In at least one conversation prior to April 27, 1991, Dr. Russell and I discussed the fact that depending upon the zoning Dr. Russell was able to deliver, the 3.67-Acre Parcel would accommodate differing numbers of different sized lots, and thus Dr. Russell would receive more money for the denser zoning.

R. 344, Supplemental Affidavit of Nathan Coulter ¶ 10.[7]

This parol evidence not only lacks clear and convincing proof that the parties agreed that Russell would assume all risks of adverse zoning but also shows that there was no meeting of the minds as to the total number, size, and price of the lots if zoning less favorable than 15,000 square-foot lots was ultimately legislated by Sandy City.[8] Accordingly,

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[7] Further evidence that the Letter Agreement was likely based on the parties' assumption that at least eight, and probably ten, lots could be developed can be found in the terms of the parties' unconsummated exchange agreement which was negotiated when Russell's attempted sale of the Russell Property to the LDS Church was thwarted. Through that transaction, the parties provided that Russell would receive a total of $230,000 for the transfer of the Russell Property. R. 21, Complaint, Exhibit 6. Dividing this number by the $26,500 price of lots in the Letter Agreement evidences the equivalent yield from 8.67 lots.

[8] To the extent Coulter may argue in its reply brief that Russell is to blame for the unfavorable zoning, such argument should be rejected. The record establishes that the Coulter Property was annexed prior to the Russell Property and had already set the standard for 20,000 square-foot-lot zoning of the contiguous properties before the Russell Property was annexed and zoned. See R. 294-99, Ordinance for Annexation and Zoning of the Coulter & Smith Property; cf. R. 67-69, Ordinance for Annexation and Zoning of the Russell Property. In any event, zoning is not something that a property owner may dictate, but is a legislative function and an activity wholly within the discretion of the legislative bodies of municipalities. See Crestview-Holladay Homeowners Ass'n v. Engh Floral Co., 545 P.2d 1150 (Utah 1976).

because the parties had not agreed on how their agreement would be affected if the Russell Property was not zoned as understood, expected, and contemplated by the parties, the essential and material terms necessary to enforce the Letter Agreement are lacking, and the parties' alleged oral agreement cannot be specifically enforced. See generally 17A Am. Jur. 2d, Contracts § 26, at 54-55 (1991) ("There must be mutual asset or a meeting of the minds on all essential elements or terms in order to form a binding contract.").[9]

II. THE LETTER AGREEMENT IS VOID UNDER THE RULE AGAINST PERPETUITIES

The rule against perpetuities provides that "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." W. Barton Leach, Perpetuities in a Nutshell, 51 Harv. L. Rev. 638, 639 (1938) [hereinafter cited as "Nutshell"]. This rule applies to all contingent interests including options and specifically requires that options be drafted so that there is no possibility that the option may be exercised outside of the perpetuities period. See Hidden Meadows Dev. Co. v. Mills, 29 Utah 2d 469, 511 P.2d 737 (1973); Anderson v. Anderson, 15 Utah 2d 7, 386 P.2d 406 (1963); Fisher v. Bailey, 14 Utah 2d 424, 385 P.2d 985 (1963); Nutshell, at 660-62. Failure to satisfy the rule against perpetuities causes the interest to be void ab initio, and the interest cannot be cured even if the contingency occurs within the prescribed time period. Nutshell, at 642; 61 Am. Jur. 2d Perpetuities § 26 (1982).

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[9] The fact that the parties were mistaken that zoning could be manipulated further shows that the oral agreement as alleged by Coulter was based on a mutual mistake and, thus, not enforceable. See generally 17A Am. Jur. 2d, Contracts § 213, at 220-21 (1991).

By drafting the Letter Agreement to tie its option rights to "completion of the lots" and "completion of the subdivision development," Coulter created an interest void under the rule against perpetuities. R. 10, Letter Agreement. The Letter Agreement has no outside time period for Coulter to complete the subdivision and, thus, no outside date for exercise of its purported option rights on the completed lots. As explained by Professor Leach in describing the case of the "inexhaustible gravel pit," this contingency of possible unlimited duration voids the interest.

> T was in the sand and gravel business. He owned gravel pits which, at the time of his death, would have been exhausted in 4 years if worked at the rate which was habitual with T. T died, leaving a will which devised to trustees the gravel pits in trust to work until the same were exhausted, then to sell the pits and divide the proceeds among T's issue then living. The pits were actually exhausted in 6 years. But the gift to issue was held bad on the ground that they might not have exhausted within 21 years.

Nutshell, at 644-45.

Coulter directs this Court to cases from California and North Carolina for support that courts no longer use the rule against perpetuities to void remotely vesting interests in commercial transactions but have abandoned it in favor of general contract rules which allow the court to infer a reasonable time requirement for vesting if no time is given. See Wong v. DiGrazia, 60 Cal. 2d 525, 386 P.2d 817, 35 Cal. Rptr 241 (1963); Rodin v. Merritt, 48 N.C. App. 64; 268 S.E.2d 539 (1980). While these cases perhaps establish that the Letter

Agreement would be valid in California and North Carolina, they do not establish the law in Utah which applies in this case.[10]

In, Fisher v. Bailey, 14 Utah 2d 424, 385 P.2d 985 (1963), a case similar to the case at hand, the Utah Supreme Court affirmed that the rule against perpetuities applies in commercial transactions. The sellers challenged the validity of a complex contract whereby they agreed to improve, plat, subdivide, and sell numerous subdivision lots to a construction company. The sellers' based their challenge on the fact that the terms of the contract gave the construction company "an option to purchase part of these lots after a life or lives in being and 21 years and the gestation period." Id. at 986. Rather than dispose of the sellers' argument by explaining that contract rules would apply in this commercial transaction, the court painstakingly analyzed the written language of the parties agreement with reference to the rule against perpetuities and determined that it did not leave any contingencies of unlimited duration but provided for exercise of purchase rights within the perpetuities period.

> Although the contract does not expressly state that all of the lots must be transferred on or before July 1, 1964, it does definitely so indicate. It not only provides for the development and release of the 61 lots before any mention is made of the

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[10] The three Utah cases cited by Coulter to show that Utah has abandoned the rule against perpetuities in commercial transactions are inapposite. See Cooper v. Deseret Federal Savings & Loan Assoc., 757 P.2d 483 (Utah 1988); Bradford v. Alvey & Sons, 621 P.2d 1240 (Utah 1980); Downtown Athletic Club v. Horman, 740 P.2d 275 (Utah App. 1987). In none of these cases was the rule against perpetuities raised by the parties or discussed by the court. Additionally, Cooper v. Deseret Federal Savings & Loan Assoc., 757 P.2d 483 (Utah 1988), did not even involve a real property "vesting" issue, but only how long a bank had to enforce contractual rights pursuant to a due on sale clause in a mortgage transaction.

> additional 21 lots, and provides for a change in the purchase price in case of a change in the cost of development, but it provides for the improvement of 12 lots within 90 days, then 49 lots after six months, and then provides for the holding of the additional 21 lots subject exclusively to the order of the buyer until July 1, 1964, but gave the Company no right to purchase those lots after that time. There was a firm agreement by the buyer to purchase and the seller to sell the 61 lots, only the time for the release of such lots which must be after January 1, 1960, was left to the option of the Company, and the sellers Bailey agreed to hold the additional 21 lots until July 1, 1964, to the order of the Company. All this fits into a pattern that all of the lots were to be transferred on or before the last mentioned date. We conclude that under these circumstances it would be unreasonable to hold that the option to purchase any of these lots could be exercised any substantial period of time after January 1, 1964, and therefore this contract does not violate the rule against perpetuities.

Id. at 987-98;[11] accord Hidden Meadows Dev. Co. v. Mills, 29 Utah 2d 469, 511 P.2d 737

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[11] Justice Crockett concurred in the result of Bailey but suggested that the court should have analyzed the transaction based on contract principles instead of the rule against perpetuities.

> I concur and offer these further observations: in a contract of this character where something is to be done in connection with planned future activities, as was the conveyance of these lots, and specification of a definite time is omitted, the law will imply that it is to be done within some such reasonable time as it must sensibly be supposed was contemplated by the parties. What the reasonable time is to be determined by looking at all of the facts and circumstances. That is what should be done here.

Fisher, 385 P.2d at 989.

The fact that Justice Crockett supported that contract rules should supplant the rule against perpetuities and the majority of the court decided the case with respect to the rule against perpetuities shows that Utah law has not abandoned this important and long-standing real property doctrine. In addition, the fact that the Supreme Court of Utah has continued to apply the rule against perpetuities in commercial option transactions suggest Justice

(1973) (court analyzed option agreement in commercial setting for validity under the rule against perpetuities).

In contrast to the agreement in Fisher, the Letter Agreement cannot be construed in any manner to provide an outside date for exercise of Coulter's purported option rights because it has no date for subdivision completion. Even though Coulter emphasized in its pleadings below that the subdivision was to be completed "forthwith" and with all "due diligence," this fact does not provide an outside date for subdivision completion and exercise of rights within the perpetuities period. See R. 227, Memorandum in Opposition to Summary Judgment.[12] Indeed, Coulter by initiating this lawsuit and pursuing this appeal has already taken the position that its option rights in the Letter Agreement last nearly five years. Moreover, since no work has been done to begin formal subdivision development of the Russell Property, Coulter will no-doubt require substantial additional time to exercise its purported rights. Russell asks this Court to recognize that Utah law has not abandoned the rule against perpetuities voiding remotely vesting interests in commercial transactions and that, therefore, the Letter Agreement is void.

Crockett's views have yet to win the day. See, e.g., Hidden Meadows Dev. Co. v. Mills, 29 Utah 2d 469, 511 P.2d 737 (1973) (court analyzed option agreement in commercial setting under the rule against perpetuities).

[12] Coulter has chosen not to emphasize the language of the Letter Agreement and its affidavits emphasizing the urgency of subdivision development in this appeal. Russell assumes that this is because such arguments militate in favor of a ruling that any time for exercise beyond Spring 1992 was beyond a "reasonable time." See infra.

III. ANY PURCHASE RIGHTS CREATED BY THE LETTER AGREEMENT HAVE LAPSED

In the event the Court declines to apply the rule against perpetuities in favor of applying general contract principles, the Court must determine and imply a "reasonable time" term in the Letter Agreement for exercise of Coulter's purported option rights. See Cooper v. Deseret Federal Savs. & Loan, 757 P.2d 483, 485 (Utah App. 1988) ("When a contract fails to specify the time by which a certain act must be performed, the law implies the act be performed within a reasonable time.). To determine what time term the law should imply, the Court should evaluate the facts surrounding the transaction to ascertain what time term may have been contemplated by the parties or is otherwise reasonable under the totality of the circumstances. See generally Bradford v. Alvey & Sons, 621 P.2d 1240, 1242 (Utah 1980). Coulter contends that this Court cannot determine a "reasonable time" term for exercise of its rights without further proceedings in the district court preceded by discovery and full trial preparation by the parties. Russell respectfully submits that further use of private and judicial resources to establish more facts is unnecessary because the undisputed facts already before the Court conclusively establish that Coulter's rights, if any, have lapsed.

In determining the reasonable time for Coulter to have tendered performance and exercised its purchase rights, the Court should initially consider the circumstances presented by the transaction involved. In this case, the transaction involves an asserted option to purchase lots to be developed on the Russell Property. Because the agreement involves a right to purchase land at a specified price, Russell would normally be entitled to strictly

enforce any timing provisions. See Catmull v. Johnson, 541 P.2d 793, 706 (Utah 1975) ("[B]y its very nature, an option is an instrument as to which time is of the essence.") (footnote omitted). In addition, equities should be balanced in Russell's favor because he is the party who must bear the burdens and carry the expenses associated with the property including maintenance of financing, insurance, taxes, and tort liability while waiting for Coulter to tender performance. See, e.g., Bradford v. Alvey & Sons, 621 P.2d at 1242 (vendor in land sales agreement conditioned on performance of purchaser entitled to equitable deference based on the fact that the vendor is bound while the purchaser may choose whether to perform); Aspinwall v. Ryan, 190 Or. 530, 226 P.2d 814, 817 (1951) (discussing equitable considerations in favor of vendor under option agreement including carrying property at vendor's expense, risk of loss, costs, insurance, and burden to patrol against trespass). The Court should also consider that the parties, presumably in recognition of costs to be borne by Russell in the event of delay, bargained for price adjustments for late payments. R. 10, Letter Agreement (providing that the price of the individual lots would increase $100 per month after completion of the lots). Within this context, the Court must determine when Coulter was required to have completed development and paid Russell for the lots.

The undisputed facts show that the parties intended Coulter to have completed development of subdivision lots on the Russell Property--thus triggering its right to purchase lots and the agreed $100 per lot per month increase--by Spring 1992. Russell has testified in his affidavit that Coulter "promised" to finish subdivision development by Spring 1992. R. 70, Affidavit of Roger Russell ¶¶ 6-7. Coulter denies that it promised anything, but admits that the parties intended that subdivision development would be accomplished with

"all due diligence" and the parties "believed that such could be done by the Spring of 1992." R. 219, Affidavit of Nathan Coulter ¶ 12; see also R. 346, Supplemental Affidavit of Nathan Coulter ¶ 14 (same). The evidence submitted by Coulter even expresses a realization that its performance was past due in Spring 1992 because it is at this time that Coulter apparently felt obligated to consult with Russell on a "weekly or biweekly basis" regarding its progress. R. 219, Affidavit of Nathan Coulter ¶ 13. Moreover, it is further undisputed that Russell took no acts in contravention of Coulter's rights until November 1992, well beyond Spring 1992, when Russell informed Coulter of his intent to sell to the LDS Church because of Coulter's inability to finish subdivision development and purchase lots within the time promised. R. 71, Affidavit of Roger Russell ¶ 15. Indeed, Coulter even admits that Russell was cooperative and acquiesced to its delays until Russell gave notice of his intent to sell to the LDS Church--at which time Coulter considered Russell to be in breach of the Letter Agreement. R. 220, Affidavit of Nathan Coulter ¶ 15. These facts show that Spring 1992 is the proper time term to be implied by law for Coulter to have exercised its rights. These facts also show that Russell did not interfere with Coulter's performance and even acquiesced to an additional reasonable time when Coulter failed to show appreciable progress toward meeting the conditions of its performance within the time period intended by the parties. There is no additional need for factual development at trial to determine that Coulter's option rights have lapsed.

Coulter's arguments that equitable adjustments may need to be made because its performance has been thwarted by contingencies beyond its control such as unfruitful negotiations with the Intervening Property owners and difficulties with government

authorities should be rejected. Appellant's Brief, at 21. Coulter, not Russell, is the party who agreed to forthwith "complete the subdivision development" as a condition to exercising purchase rights. See Appellant's Brief, at 26-29. Russell did not assume risks of unforeseen delay and cannot be fairly expected to hold his property indefinitely until Coulter is able to perform. Equity, instead, demands that Russell either be compensated fairly for losses caused by Coulter's delay or that he be allowed to sell his property to another willing buyer.

It is now approaching five years since the Letter Agreement was signed and four years since Spring of 1992 when Russell should have been paid for the lots. Coulter failed to forthwith develop the Property and failed to even make appreciable progress by Spring 1992. The Russell Property remains as it was in April 1991 when the Letter Agreement was signed, and Russell has realized no tangible benefit from any of Coulter's acts. Although Coulter has sued Russell seeking specific performance of the Letter Agreement, it is clear that Coulter has not timely fulfilled the conditions for exercise and tendered performance as is required before bringing such a suit. See also Aspinwall v. Ryan, 190 Or. 530, 226 P.2d 814, 817 (1951) ("Before an optionee may bring suit for specific performance he must clearly, explicitly, and unequivocally, within the time specified, communicate to the optionor his acceptance of the offer contained in the option."). It is also clear that tender of such performance is likely to be months or years in the future because Coulter has several major obstacles to overcome before it can develop the Property as planned and promised.[13] The

[13] These include: (1) rezoning of all properties included in its planned single subdivision to allow for building of 10,000 or 15,000 square-foot lots as originally contemplated, R. 67-68, Annexation and Zoning Ordinance for the Russell Property, (2) resolving a lawsuit with one Intervening Property owner, R. 304-13, Complaint and Answer in Coulter & Smith, Ltd.

parties' did not agree or intend that Coulter's rights under the Letter Agreement would last indefinitely. Rather, the whole tenor of the transaction, as supported by the documents and affidavits submitted by the parties, was that the Letter Agreement was for the immediate development, platting, and transfer of lots. Accordingly, this Court should determine that these undisputed facts show Coulter's rights, if any, have lapsed.

IV. ANY OFFER OR CONTRACT TO SELL LOTS CREATED BY THE LETTER AGREEMENT HAS BEEN WITHDRAWN OR RESCINDED

An option without consideration is merely a continuing offer to sell at a certain price that can be withdrawn at any time before acceptance. 77 Am. Jur. 2d Vendor & Purchaser § 34 (1975). Withdrawal of an offer may be express or implied by conduct that is inconsistent with the offer. Restatement (Second) of Contracts § 43. Coulter did not dispute below, and does not dispute on appeal, this legal principle or the fact that Russell unequivocally withdrew and revoked his offer to sell "lots" in November 1992 when he informed Coulter of his intent to sell to the LDS Church. Rather, Coulter asserts that Russell cannot withdraw his offer because it has given "ample consideration" in exchange for its rights to purchase under the Agreement. Appellant's Brief, at 26-29.

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v. Kemp, and (3) purchasing a parcel from another Intervening Property owner who has, as yet, declined to sell. R. 320, Affidavit of Karen Hillstead Smith. Even if all preliminary matters were resolved, actual development would take substantial efforts and significant time to accomplish. See Sandy City Code of Ordinances, Subdivision Regulations § 15-34-1 et seq. (Draft Feb. 6, 1996) (administrative, bonding, and construction requirements for subdivision development). It is also questionable whether Coulter can even legally purchase or develop any property as its authority to transact business in Utah was revoked at the time it filed its Complaint. See R. 318, Certificate of Revocation.

Coulter paid no money for its rights under the Letter Agreement. R. 70, Affidavit of Roger Russell ¶ 8. Notwithstanding, Coulter argues that Russell received consideration for its option rights through its promise to complete the subdivision development. Appellant's Brief, at 27-28. While Russell does not dispute that Coulter promised to forthwith develop and subdivide the Russell Property as a necessary condition to purchasing future lots, this promise is likely illusory and unenforceable by Russell and, thus, cannot serve as consideration for Russell's grant of option rights. See Estate of Schmidt v. Downs, 775 P.2d 427, 431 (Utah App. 1989) ("an option is a unilateral obligation binding only on the optionor"); Resource Management Co. v. Weston Ranch and Livestock Co., Inc., 706 P.2d 1028, 1036 (Utah 1985) ("For mutual promises of the parties to a bilateral contract to constitute consideration for each other, the promises must be binding.").

Coulter next argues that since it has begun performance of the condition precedent to exercise of rights in the Letter Agreement--namely, to subdivide the Russell Property--in reliance on the Letter Agreement, that such performance is a substitute for consideration and estops Russell from withdrawing his offer--presumably until Coulter is able to tender performance through completion of subdivision development and payment. Appellant's Brief, at 27-28. Coulter alleges that the same facts which show partial performance of the Letter Agreement under the Statute of Frauds apply to this theory. However, for the same reasons that Coulter's actions are insufficient to show partial performance, they are also insufficient to support a theory of promissory estoppel. See Knight v. Seattle First Nat'l Bank, 22 Wash. App. 493, 589 P.2d 1279, 1282 (1979) (explaining that the part performance by offeree sufficient to preclude withdrawal of an unilateral offer must be clearly referable

to the offer, definite and substantial, and beneficial to the offeror and further that "[b]eginning preparations though they may be essential to carrying out the contract or accepting the offer, is not enough.").

Even if the Court were to determine that Coulter's part performance raised an issue of material fact regarding whether Russell was estopped from withdrawing his offer, the Court should still affirm the district court's summary judgment because Russell's withdrawal could equally be considered a rescission of any enforceable contract. Although ignored in its appellate brief, Coulter took great care to emphasize in its opposition papers that the parties understood that Coulter would complete development of the subdivision "forthwith" and with "due diligence." E.g., R. 227, Memorandum in Opposition to Summary Judgment. Coulter has also submitted affidavit testimony explaining that the parties intended and believed the lots would be developed and ready to purchase by Spring 1992. R. 219, Affidavit of Nathan Coulter ¶ 12; R. 346, Supplemental Affidavit of Nathan Coulter ¶ 14. Notwithstanding Coulter's "substantial efforts" to develop the Property (which included no physical work on the Property and no necessary, preliminary administrative work to allow for subdivision plat approval) nothing had happened by Spring 1992--which was the time the parties intended for all conditions to have been met and Russell paid. Assuming the Letter Agreement was enforceable, Russell was justified and entitled to rescind it by virtue of Coulter's failure to perform forthwith. See generally 17A Am. Jur. 2d Contracts § 583 (1991) ("It has been said, moreover, that in a transaction in which prompt action was evidently contemplated by both parties, mutual delinquency gives rise to the presumption of mutual assent to a rescission."); 17A Am. Jur. 2d Contracts § 584 (1991) ("[T]here is

authority that a great delay in performance may be regarded as a ground for rescission even though time is not of the essence and no notice to perform has been given."). In addition, the fact that Coulter agreed to relinquish its rights under the Letter Agreement by agreeing to trade the Coulter Property for the Russell Property shows that Coulter acknowledged and accepted the fact that Russell withdrew his offer and rescinded any enforceable contract. See R. 15-51, Real Property Exchange Agreement.

CONCLUSION

The Court should ensure that Russell suffers no further prejudice or delay through the cloud that Coulter has inequitably demanded remain on Russell's property through this lawsuit and appeal. There is no genuine issue as to any material fact necessary for this Court to determine that the Letter Agreement is void and cannot be specifically enforced by Coulter. Accordingly, Russell respectfully requests that the Court affirm the district court's summary judgment in its favor.

DATED this 12th day of February 1996.

JARDINE, LINEBAUGH & DUNN

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February 1996, I caused a true and correct copy of the foregoing **APPELLEES' BRIEF** to be mailed, postage prepaid, to the following:

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